

evidence and illegal identification procedure raised in *Heck*, has caused some courts—including this one in *Gauger*—to conclude that certain Fourth Amendment claims also do not accrue until after the defendant's conviction has been invalidated. See, e.g., *Gauger*, 349 F.3d at 362; *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (holding that Fourth Amendment claims based on illegal search and seizure of evidence are not cognizable until the conviction is overturned or charges dismissed); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999) (finding that generally false arrest claims accrue at the time of arrest, but that if success in the § 1983 case would “imply the invalidity of a conviction in a pending criminal prosecution,” it does not accrue “so long as the potential for a judgment in the pending criminal prosecution continues to exist”).

Heck itself instructs that a district court must:

consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (emphasis in original) (footnotes omitted). Footnote seven in *Heck* anticipates at least some Fourth Amendment cases. It suggests that despite the general rule of *Heck*, a suit for damages arising from an unreasonable search could go forward as a § 1983 claim without invalidating a criminal prosecution, because of the independent source or inevitable discovery doctrines. In *Gonzalez*, we saw two implications in the footnote: “(i) a claim based on an unlawful search or arrest may be brought immediately,

because a violation of the fourth amendment does not necessarily impugn the validity of a conviction—the evidence may be properly admitted anyway, or it may be excluded and the defendant convicted on other evidence—and (ii) a claim of damages based on the injury of being convicted is impermissible until the conviction has been overturned.” 133 F.3d at 553 (internal quotation marks omitted).

In *Booker v. Ward*, we interpreted *Heck* to allow a false arrest claim to go forward before the defendant’s conviction was invalidated:

[A] wrongful arrest claim, like a number of other Fourth Amendment claims, does not inevitably undermine a conviction; one can have a successful wrongful arrest claim and still have a perfectly valid conviction. Although in this case the Illinois Appellate Court’s conclusion that Booker’s confession was the inadmissible product of an unlawful arrest ultimately resulted in the dismissal of murder charges against Booker, in many cases, the prosecutor will have other witnesses or other evidence that will support a retrial.

94 F.3d at 1056 (citations omitted). The approach that the court took looked to the legal nature of the wrongful arrest claim, rather than to the specific facts of the case.

The *Gauger* opinion, in contrast, rejects an across-the-board approach to Fourth Amendment claims in favor of a case-by-case examination under which at least some false arrest claims would not accrue until after the conviction was invalidated:

It might be argued that *Gauger* could have sued right after his arrest, even if he might also have waited until his criminal conviction was thrown out. But we do not think that such a conclusion would be consistent with *Heck*. For he could not knock out the arrest

without also (by virtue of *Wong Sun* [v. *United States*, 371 U.S. 471 (1963)]) invalidating the use in evidence of his admissions, without which, as we have said, he could not be convicted. *Heck*, to repeat, says that a criminal defendant can't sue for damages for violation of his civil rights, if the ground of his suit is inconsistent with his conviction having been constitutional, until he gets the conviction thrown out.

349 F.3d at 362. See also *Wiley*, 361 F.3d at 997-98.

In our view, although it is conceivable that there are factual differences among Booker's, Gauger's, and Wallace's cases, the distinctions are unimportant in the end. In Gauger's case, the police suspected Gauger of murdering his parents. 349 F.3d at 356. They brought him in for questioning and Gauger made several incriminating statements that, according to his version of the interrogation, were stated as hypotheticals. *Id.* at 357. Gauger was convicted and sentenced to death. On appeal, the Illinois Appellate Court determined that his statements were inadmissible as the product of an unlawful arrest. *Id.* The court ordered a new trial, but the state never retried him and the charges were dropped after two members of the Outlaws motorcycle gang confessed killing Gauger's parents. *Id.* at 358. The resemblance to Wallace's case is plain.

It is true that in Booker's case, as in Wallace's, the state appellate court first remanded for an attenuation hearing before ordering a new trial. See *Booker v. Ward*, 94 F.3d at 1054. The result of the attenuation hearing was a conclusion that the confession was sufficiently attenuated from the defendant's unlawful arrest, but the Illinois Appellate Court reversed. *Id.* Just as in Wallace's case, at this point the prosecution filed a motion for a *nolle prosequi*, and the court dropped the charges against Booker. *Id.* It is telling that in both Booker's and Wallace's cases, the state appellate court formally decided that the defendant's

criminal prosecution could continue even though the arrests were unlawful. Only the pragmatic judgment of the prosecutors, which could have rested on a conclusion that it was unlikely that any additional evidence existed, or on a lack of resources for further investigation, or any of a number of other factors, caused the cases to end. The rule we articulated in *Booker v. Ward* recognizes that *ex ante* it is not readily apparent which criminal cases might proceed despite the consequences of the successful Fourth Amendment challenge. This, in our view, argues against a rule that requires judges several years after the event to decide whether a particular Fourth Amendment challenge would have been the death knell of the prosecution.

Even if a clear rule is what is needed, we still need to decide between options (1) and (2) above: that is, between a rule saying that all claims of this type accrue at the time of injury, and a rule that they all accrue only when the criminal conviction has been set aside. The footnote in *Heck* to which we referred earlier persuades us that the Supreme Court did not contemplate the second rule, as it took care to suggest that the statute of limitations should begin running on at least some claims at the time of the original injury. Although the Court refrained from holding that all Fourth Amendment claims accrue immediately, it had no need to reach that issue in *Heck*. We conclude that the approach taken by *Booker v. Ward*, while an arguable extension of *Heck*, is an extension that is justifiable in light of the policies behind both the statute of limitations and the need to avoid unnecessary interference with the outcomes of criminal proceedings.

To the extent, therefore, that *Gauger* eschews a clear rule for false arrest claims in favor of an evaluation of the evidence, we disapprove its approach and instead reaffirm our holding in *Booker v. Ward* that a "§ 1983 unlawful arrest claim . . . accrue[s] on the day of [] arrest." *Id.* at 1056-57. Individuals and attorneys who wish to preserve a

claim for false arrest or similar Fourth Amendment violations should file their civil rights action at the time of arrest. It will still be possible, of course, for a district court to stay any such action until the criminal proceedings are concluded, should it conclude in its discretion that a stay would be useful. We note as well that we are addressing only the question of accrual; other doctrines, such as equitable tolling, may also affect the time in which a particular suit may be brought. See *Heck*, 512 U.S. at 489 (reserving judgment on whether equitable tolling applies in this context).

One additional qualification is necessary, which in our view answers the concerns expressed in the dissent. *Heck* itself recognized that it is possible for a § 1983 claim based on false arrest or a similar Fourth Amendment violation "necessarily [to] imply the invalidity of [a plaintiff's] conviction or sentence," *Heck*, 512 U.S. at 486 n.6, 487 (example of plaintiff convicted of resisting arrest who challenges legality of arrest). The case to which the Court pointed, however, is one in which the fact of a Fourth Amendment violation is an element of the claim. In that relatively uncommon set of cases, there is an independent reason to insist that a plaintiff wait to sue until the criminal conviction has been set aside; if she does not, the possibility of inconsistent rulings on the validity of the arrest is too great. Our ruling addresses the normal run of cases, in which the Fourth Amendment violation affects only the evidence that might or might not be presented to the trier of fact. In those instances, we are convinced that a clear accrual rule is superior to a case-by-case approach.

As the parties have noted, the question of the proper rule for accrual is an issue that has divided our sister circuits. Although their reasoning varies, the Second, Fourth, Fifth, Sixth, and Ninth Circuits have held that false arrest claims that would undermine the defendant's

conviction cannot be brought until the conviction is nullified. See *Harvey*, 210 F.3d at 1015 (acknowledging circuit split and holding flatly that "a § 1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned"); *Covington*, 171 F.3d at 124; *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 399 (6th Cir. 1999) (explicitly rejecting suggestion that § 1983 illegal search claims accrue at the time of injury, since such a rule would "misdirect the criminal defendant" from focusing on "mounting a viable defense to the charges against him"); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (holding that success on false arrest claim would "necessarily imply" that conviction for disturbing the peace was invalid as not based on probable cause); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996) (*Heck* bars civil rights claims "when a § 1983 plaintiff's success on a claim that a warrantless arrest was not supported by probable cause necessarily would implicate the validity of the plaintiff's conviction or sentence"); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (stating that "a claim of unlawful arrest, standing alone, does not necessarily implicate the validity of a criminal prosecution following the arrest," but staying the civil action until the criminal prosecution was completed).

The First, Third, Eighth, Tenth, and Eleventh Circuits have held that false arrest claims accrue at the time of the arrest. *Nieves v. McSweeney*, 241 F.3d 46, 52-53, 52 n.4 (1st Cir. 2001) (stating that "it is pellucid that all claims based on the officers' physical abuse or arrest of the appellants accrued at the time that those events occurred . . . because the appellants had ample reason to know of the injury then and there," and characterizing as "rare and exotic" the "circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the ar-

rest"); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558, 559 n.4 (10th Cir. 1999) ("We generally disagree with the holdings in [Covington and Mackey] because they run counter to *Heck*'s explanation that use of illegally obtained evidence does not, for a variety of reasons, necessarily imply an unlawful conviction."); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998) (finding § 1983 false arrest claim not barred by *Heck*); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (finding § 1983 coerced confession claim not barred by *Heck*); *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (per curiam) (finding § 1983 illegal search claim not barred by *Heck*). By aligning ourselves with one side of this debate, we do not break any new ground.

B. False Confession Claim

Wallace also asserts a "false confession" claim that he claims is actionable under the Fourth Amendment, relying on the following language in *Gauger*:

[Gauger's] incarceration resulted from the combination of a false arrest with (if his testimony is believed) a false account of his interrogation. If his testimony is believed, therefore, the seizure of his person was from the beginning to the end of his incarceration unreasonable, and shouldn't that bring the allegedly fraudulent account of his interrogation under the Fourth Amendment?

349 F.3d 360. In support of his claim, Wallace tries to distinguish a "continuing Fourth Amendment violation" from the "continuing seizure" theory discussed in Justice Ginsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994). See *id.* at 279 (Ginsburg, J., concurring). His efforts are necessary, at least in this court, because we have already rejected a "continuing seizure" theory in the Fourth Amendment context. See *McCullah v. Gadert*,

344 F.3d 655, 661 (7th Cir. 2003) (citing *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996)). Nonetheless, we find them unavailing. Wallace tries to find some support for it in *Chavez v. Martinez*, 538 U.S. 760 (2003), but as we read that case it dealt only with the Fifth Amendment and the due process clauses. We reject the idea of a stand-alone "false confession" claim based on the Fourth Amendment, rather than the Fifth Amendment or the due process clauses.

C. Fourteenth Amendment Claim

Finally, Wallace tries characterizing his false confession claim as a violation of his Fourteenth Amendment right to a fair trial. Wallace contends that our decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), allows for a "false confession" claim as a due process violation. In *Newsome*, we affirmed the district court's decision to deny qualified immunity to two officers who had withheld exculpatory evidence from the defendant. *Id.* at 753. The reason was because, under *Brady v. Maryland*, 373 U.S. 83 (1963), officers who withhold such material violate a defendant's right to a fair trial. 256 F.3d at 752. See also *Lenco v. City of Chicago*, 286 F.3d 994, 999 (7th Cir. 2002) (allowing plaintiff to amend complaint to assert due process claim against police officers who withheld evidence); *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988) (allowing claim against officers who allegedly fabricated evidence and concealed exculpatory evidence to go forward).

As these brief summaries demonstrate, *Newsome*, *Lenco*, and similar cases do not stand for the proposition that there is a free-standing due process claim whenever unfair interrogation tactics (short of those that may shock the conscience and thereby implicate the Supreme Court's substantive due process rulings) are used to obtain a confession. Instead, they are grounded in tradi-

tional notions of what is required for a fair trial, including the *Brady* right to be given exculpatory material. In the end, all Wallace has is a complaint about the arrest and the subsequent confession, and that is the claim we have found to be time-barred. He cannot escape that result merely by re-characterizing the claim under a different part of the Constitution.

III

The City argued in the alternative that Wallace was not entitled to bring his suit under the *Heck* rule because the state court proceedings did not conclude in his favor. It reasons that the state *trial* court found that his confession was voluntary; that this finding was not disturbed as a matter of Illinois law when the state appellate court reversed and remanded the trial court's judgment; and that Wallace cannot prevail in his § 1983 action if this central fact is taken as established. Because we have resolved this appeal in favor of all three defendants on the statute of limitations ground, we decline to reach the City's alternative argument. It depends centrally on the intricacies of the law of collateral estoppel in Illinois, which is a topic on which all we could do in any event is to follow the Illinois courts to the best of our ability.

The judgment of the district court is AFFIRMED.

POSNER, *Circuit Judge*, dissenting from denial of rehearing en banc. The panel decision creates an intercircuit conflict on a recurrent issue: when does a claim for damages arising out of a false arrest or other search or seizure

forbidden by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits of the search or the confession were introduced in the claimant's criminal trial, and he was convicted? The panel holds that, except in the rare case in which a violation of the Fourth Amendment is an element of the crime with which the defendant is charged, it always accrues at the time of the arrest, search, or confession. Every other case to address the issue, including our own *Gauger v. Hendale*, 349 F.3d 354 (7th Cir. 2003), holds that it *usually* accrues then, but not if the Fourth or Fifth Amendment claim, if valid, would upset the conviction. If it would, the claim does not accrue unless and until the conviction is vacated. In other words, a civil rights suit is not a permissible vehicle for a collateral attack on a conviction.

That is the holding of *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court said that the district court must "consider whether a judgment [in the civil rights suit] in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 486-87. The Court gave the following example of "a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful": "A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. . . . He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concern-

ing res judicata, . . . the § 1983 action will not lie." 512 U.S. at 486 n. 6 (emphasis in original). Faced with this flat statement, the panel carves the exception to its new rule that I mentioned in the first paragraph but does not give a reason for limiting the Court's exception to the particular illustration that the Court gave. The panel says only: "we are convinced that a clear accrual rule is superior to a case-by-case approach." It does not explain the source of its conviction.

Its accrual rule is not "clear," as I'll point out; it is also inconsistent with the principles of accrual. A suit cannot be filed—the claim on which it is based cannot have accrued—at a time when, because a condition precedent to suit has not been satisfied, the suit must be dismissed. The panel holds that the suit must be filed within the limitations period for section 1983 suits (usually two years) from the date of the arrest, search, or, as in this case, confession, even if at the end of the two years the plaintiff's conviction has not been vacated and even if the only evidence of his guilt presented at his criminal trial was the challenged evidence or confession. This is so, the panel holds, even though, to quote *Heck*, a judgment in the plaintiff's favor in the civil suit "would necessarily imply the invalidity of his conviction" because it would wipe out all of the evidence against him.

And if the plaintiff waits to sue until his conviction is vacated, he will not have the full statutory period within which to sue because he will be able to avoid dismissal only by appealing to the doctrine of equitable tolling. (That's assuming equitable tolling is available in *Heck* cases, a question the panel leaves open.) Equitable tolling permits a plaintiff to delay suing beyond the statutory limitations period if he is unable despite all due diligence to sue within the period; but as soon as he is able to sue he must. He is denied the benefit of the full statutory period. *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1213 (7th Cir.

1993); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990).

So the panel's decision puts the squeeze on these plaintiffs, contrary to normal principles of accrual, which do not force you—in fact do not allow you—to sue before you have a claim. If you have been convicted and success on your civil rights claim would undermine your conviction, you have no civil rights claim unless and until you get the conviction set aside. If the search turned up no evidence, or the confession was excluded at the criminal trial, or the other evidence of guilt was overwhelming, the claim does not challenge the conviction and so it accrues at the time of the search. But that is not every case.

The proper response is to adopt a presumption against the unlikely result. (The panel does not discuss that alternative.) The presumption would be that even if the plaintiff's Fourth or Fifth Amendment defense had prevailed in the criminal proceeding against him, he still would have been convicted, either because the violation had not produced evidence used against him in that proceeding or because, though it had, there was plenty of other evidence to convict him. The presumption would be rebutted if, for example, the only evidence of his guilt was evidence seized in a search that he challenges in his section 1983 suit. This is not a hypothetical case; it is our twin *Okoro* cases, *Okoro v. Bohman*, 164 F.3d 1059, 1061 (7th Cir. 1999), and *Okoro v. Callaghan*, 324 F.3d 488 (7th Cir. 2003). The plaintiff, who had been convicted of a drug offense on the basis of heroin found during a search of his home, brought a federal civil rights suit in which he claimed that he had offered to sell the police jewels (which he claimed they stole from him in response to his offer), not drugs. His conviction was never reversed or otherwise nullified. We held the suit barred by *Heck* because if he was believed he should not have been convicted, since the heroin was essential to the conviction; and so his Fourth Amendment suit for the allegedly stolen

jewelry was barred. *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996), is a similar case with the same result.

Another clear case is *Gauger* itself. His conviction, we pointed out, "rested crucially on the statements that he made to the police when he was questioned after being arrested. Earlier we said that he might well have been prosecuted even if his version of the interrogation had been accepted, because his version was incriminating though not as much so as the prosecutors' version. With no statement at all in evidence, however, he could not have been convicted of guilt of his parents' murder beyond a reasonable doubt; the other evidence—the lack of forced entry or signs of struggle, for example—was probative merely as corroboration of his statements construed as a confession or at least as damaging admissions. So when he showed that the statements were the product of a false arrest and hence were inadmissible at his criminal trial, he successfully impugned the validity of his conviction, as the state implicitly conceded when it dropped the charges against him following the reversal of his conviction." 349 F.3d at 361-62.

There will be tough borderline cases, but the tough cases are not resolved by the decision today. They will simply be fought out as equitable-tolling cases rather than accrual cases—if equitable tolling is available, a question on which the panel, as I noted, reserves judgment: so much for the panel's having adopted a "clear rule." If equitable tolling is unavailable, then Fourth and Fifth Amendment claimants will automatically file within the statutory period dated from the search—and then plead with the district court to disobey *Heck* and not dismiss the suit, even if it is not yet ripe because the conviction has not been set aside and its validity depends on the validity of the search. As the Sixth Circuit sensibly observed in *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 399 (6th Cir. 1999), "just as a convicted prisoner must first seek relief through habeas

corpus before his § 1983 action can accrue, so too should the defendant in a criminal proceeding focus on his primary mode of relief—mounting a viable defense to the charges against him—before turning to a civil claim under § 1983.” The panel does not discuss that observation.

The panel denies that it is creating an intercircuit conflict. It says that there is already a conflict and it is just taking sides. Citing five cases, the panel states flatfootedly: “The First, Third, Eighth, Tenth, and Eleventh Circuits have held that false arrest claims accrue at the time of the arrest By aligning ourselves with one side of this debate, we do not break any new ground.” That is incorrect. None of those cases hold that such claims *always* accrue at the time of arrest. All they hold is that *normally* a Fourth Amendment claim accrues them. Not one of them even *says* (as distinct from *holds*) that it *always* does, and two of the five explicitly allow for later accrual in exceptional cases.

The five cases are *Nieves v. Sweeney*, 241 F.3d 46, 52-53 (1st Cir. 2001); *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 558 (10th Cir. 1999); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998); *Simmons v. O'Brien*, 77 F.3d 1093, 1097 (8th Cir. 1996), and *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (per curiam). *Nieves* acknowledges that there may be cases “in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest.” 241 F.3d at 52 n. 4. Even the passage that the panel quotes from *Nieves* acknowledges that a section 1983 claim does not always accrue at the time of arrest. *Id.* *Beck* also acknowledges such a possibility. 195 F.3d at 558-59. In *Montgomery*, the plaintiff’s claims, which were for false arrest and false imprisonment, were unrelated to the outcome of the criminal prosecution against her. Her “claim for false arrest . . . covers damages only for the time of detention until the issuance of process or arraignment, and not more. In addition, Montgomery’s section 1983 false imprisonment claim relates only to her arrest and the

few hours she was detained immediately following her arrest. Montgomery therefore reasonably knew of the injuries that form the basis of these 1983 claims on the night of her arrest." 159 F.3d at 126 (citations omitted).

In *Datz*, a search case, the court held that the plaintiff did not have to wait until the outcome of his criminal case to bring his civil case because it was uncertain whether a ruling in the civil case that Datz's search had been illegal would be inconsistent with his criminal conviction, for "even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error." 51 F.3d at 253 n. 1. Since Datz was convicted of being a felon in possession of a firearm, and the firearm was found in the search, it might seem that his conviction could not coexist with invalidating the search. But as the state court that upheld his conviction noted, "ammunition for the weapon also was found in two locations in appellant's house. The police evidence custodian testified appellant contacted him numerous times, by phone and in person, seeking return of 'his AR-15 rifle.'" *Datz v. State*, 436 S.E.2d 506, 509 (Ga. App. 1993). If there is untainted evidence here, the panel's result might well be correct, but there is no discussion of the other evidence in its opinion. In *Simmons* the only issue discussed is whether admission of a coerced confession can be a harmless error; as far as appears, no issue was made of whether the admission of the confession had been harmless. 77 F.3d at 1094-95. The panel does not discuss *Montgomery*, *Datz*, or *Simmons*; its characterization of them (e.g., "finding § 1983 coerced confession claim not barred by *Heck*") is consistent with the principle that the claim *usually* accrues later.

The cases that the panel acknowledges are in conflict with its accrual rule are, besides *Gauger*, *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000); *Shamaeizadeh v. Cunigan*,

supra, 182 F.3d at 399; *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996), and *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995). The list is incomplete. Mysteriously omitted, without comment, are *Uboh v. Reno*, 141 F.3d 1000, 1006-08 (11th Cir. 1998), and *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam). *Nieves*, at least, must be added to the list along with *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995), cited in *Nieves*, as well as our decision in *Booker v. Ward*, 94 F.3d 1054, 1056 (7th Cir. 1996), where we said, examining the proceedings in the Illinois courts, "that success on Booker's unlawful arrest claim would not necessarily undermine the validity of his conviction." That's the test, all right. And note that *Beck*, one of the cases the panel cites for its rule, expressly declined to reject *Covington*. 195 F.3d at 559 n. 4.

The panel may have been misled by the reference in *Harvey v. Waldron*, *supra*, 210 F.3d at 1015, to "a split in the circuits." The court in *Harvey* mischaracterizes the approach of courts (including itself!) that reject the approach taken by the panel today. It describes them as holding that a Fourth or Fifth Amendment claim *never* accrues until and unless the conviction is vacated. Those courts hold only that such a claim *sometimes* doesn't accrue until then, for example if there is no other evidence to support the conviction besides evidence claimed to have been obtained illegally. So in *Harvey* the court went on to satisfy itself that the evidence alleged to have been illegally seized was essential to Harvey's conviction. *Id.* at 1015-16.

The panel is right that there are two groups of cases. But they are consistent. One holds that a Fourth or Fifth Amendment claim accrues at the time of arrest, assuming the conviction does not depend on the evidence alleged to

have been illegally seized. The other holds that the claim does not accrue then if the conviction does depend on that evidence.

I count 12 cases to 0 against the panel's approach, with the other three cases (*Montgomery*, *Simmons*, and *Datz*) noncommittal but consistent with the 12. So one-sided a score should give us pause. If there is a compelling practical reason for flouting conventional statute of limitations principles, forging a lonely path, and creating more work for the Supreme Court, which now faces an intercircuit conflict on a recurrent issue, the panel has not explained what it might be.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

(3)
No. 05-779

FILED

FEB 28 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

Peter Verniero, Ronald Susswein, John Fahy,
George Rover, J.W. Pennypacker, and Sean Reilly,

Petitioners,

v.

Emory E. Gibson, Jr.,

Respondent

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ZULIMA V. FARBER
Attorney General of New Jersey
PATRICK DEALMEIDA
Assistant Attorney General
LARRY R. ETZWEILER*
Senior Deputy Attorney General

R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625
(609) 633-7786
* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY TO RESPONDENT'S BRIEF IN OPPOSITION	1
A. The Issue of the Appropriate Remedy for Selective Enforcement Was Litigated Below and Is Properly Before the Court	1
B. Whether Delayed Accrual Applies to Claims That Are Not Cognizable in Habeas Corpus Is Fairly Included in the First Question Presented and Is Properly Before the Court	4
C. The Circuit Split Is Substantial and Warrants Review	5
D. Policy Considerations Advanced by Respondent Do Not Diminish the Need for Review	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES CITED	Page
<i>Anderson v. Franklin County</i> , 192 F.3d 1125 (8th Cir. 1999)	5
<i>Beck v. City of Muskogee Police Dep't</i> , 195 F.3d 553 (10 th Cir. 1999)	6
<i>Cope v. Anderson</i> , 331 U.S. 461 (1947)	7
<i>Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.</i> , 530 U.S. 238 (2000)	4
<i>Heck v. Humphrey</i> , 512 U.S. 477 (1994)	passim
<i>Hughes v. Lott</i> , 350 F.3d 1157 (11th Cir. 2003)	6
<i>Ienco v. Angarone</i> , 429 F.3d 680 (7th Cir. 2005)	5, 9
<i>Ienco v. City of Chicago</i> , 286 F.3d 994 (7th Cir. 2002)	5
<i>Nelson v. Campbell</i> , 541 U.S. 637 (2004)	7
<i>Nieves v. McSweeney</i> , 241 F.3d 46 (1st Cir. 2001)	7
<i>Rawlings v. Ray</i> , 312 U.S. 96 (1941)	7
<i>Spencer v. Kemna</i> , 523 U.S. 1 (1998)	4, 5
<i>State v. Kennedy</i> , 247 N.J. Super. 21, 588 A.2d 834 (App. Div. 1991)	3
<i>State v. Segars</i> , 172 N.J. 481, 799 A.2d 541 (2002)	2, 3

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

A. The Issue of the Appropriate Remedy for Selective Enforcement Was Litigated Below and Is Properly Before the Court.

Respondent, in his opposing brief in No. 05-779, contends that "the issue of what is the appropriate remedy for a selective enforcement claim . . . was not argued in the lower courts." Brief in Opp., p. 17. This contention is baseless because the appropriate remedy for selective enforcement is an indispensable element of the application of the delayed-accrual rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), to a § 1983 claim of selective enforcement, and this issue was argued and litigated from the very inception of this case. To the extent the argument over remedy may have been abbreviated, the abbreviation occurred because, in the district court, respondent agreed with petitioners that the appropriate remedy is suppression. Not until his appeal did respondent change his position and argue that dismissal of the charges, rather than suppression, would have been appropriate.

In the district court, in supporting their contention that *Heck* did not delay the accrual of respondent's selective-enforcement claim, petitioners argued that respondent's § 1983 claim alleging selective enforcement, if successful, "would imply only the illegality of the arrest and search and seizure and the consequent taint of seized evidence intended for use in the criminal trial." *Brief in Support of Defendants' Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6)*, dated April 16, 2003, filed July 15, 2003,¹ pp. 10-11. Respondent disagreed with petitioners' construction of *Heck* but acknowledged that his "selective enforcement claims would have required suppression of evidence." *Plaintiff's Brief and Appendix in*

¹ At this time in 2003, the motion practice of the United States District Court for the District of New Jersey required parties to exchange opposing motion papers and then to file all papers simultaneously. Thus, the signature date appearing upon papers often preceded the filing date.

Opposition to Motion to Dismiss, dated June 20, 2003, filed July 15, 2003, p. 25. Respondent discussed, quoted from, and relied upon state-court caselaw to support “the appropriateness of the suppression remedy in profiling claims.” *Ibid.* The district court agreed with the parties that the claim of selective enforcement, if successful, would have warranted only the suppression of the seized evidence. (Petition App., 65a-66a).

In the circuit court, however, respondent contended that “the remedy for selective enforcement or selective prosecution is *dismissal* of the criminal charges.” *Brief of Appellant Emory E. Gibson, Jr.*, filed June 14, 2004, p. 19 (emphasis in the original). Respondent cited to and quoted from caselaw in support of this contention. *Id.* at 18-20. Petitioners disagreed and argued that the district court was correct. *Brief on Behalf of Appellees Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly*, filed September 13, 2004, pp. 26, 31-32.² Although the court below accepted respondent’s position, respondent errs to contend that it did so without argument.

Respondent contends that “the New Jersey courts were clear that the remedy is *dismissal* of the charges.” Brief in Opp., p. 14. On the contrary, the New Jersey courts are clear that “[o]nce it has been established that selective enforcement has occurred” the fruits thereof “will be suppressed.” *State v.*

² Respondent asserts that “[i]n the court of appeals, petitioners argued that the selective enforcement claim was limited to the stop of the car (and not to the detention, search and arrest of plaintiff).” Brief in Opp., p. 16. To the contrary, petitioners argued that “the only charge that would have been subject to dismissal if a court had found that the Trooper Defendants selectively enforced the traffic laws would have been any motor-vehicle related charges which had been issued to [Gibson],” *Brief on Behalf of Appellees Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly*, filed September 13, 2004, p. 31, but agreed that suppression may have occurred on the drug charges.

Segars, 172 N.J. 481, 492-93, 799 A.2d 541, 548-49 (2002).³ Suppression would have been the remedy at respondent's retrial if selective enforcement had been established and if the State had chosen to re-try the matter. Dismissal in respondent's case occurred because "in the interests of justice" the State forewent the opportunity to "litigat[e] the issue of selective enforcement" and moved to "dismiss the indictment[] with prejudice." Petition App., 110a; 111a-112a.

Respondent argues that "no clarification is needed" on the "reach of footnote 7 of *Heck*" as applied to a claim of selective enforcement because "no lower federal court has ruled contrary to the decision below." Brief in Opp., pp. 14-15. Clarification is needed because lower federal courts are unanimous that *Heck*'s footnote seven pertains not only to Fourth Amendment claims of unlawful seizure but also to similar claims that would, if successful, result in the suppression of evidence at the criminal trial rather than outright dismissal of the criminal charges. Petition, pp. 9-10. And federal and state courts have ruled that the remedy for selective enforcement is suppression, rather than dismissal. Petition, pp. 21-22. Clarification is needed on the reach of footnote seven of *Heck* as applied not only to Fourth Amendment claims but also to claims of selective enforcement.

Respondent argues that "the issue of what is the appropriate remedy for a selective enforcement claim should be decided in a case that directly presents that issue." Brief in Opp., p. 12. Respondent's view that this case does not "directly" present the issue is tantamount to his claim that *Heck*'s footnote seven requires a fact-based inquiry. Because the petition properly raises the propriety of that claim, the

³ Respondent appears to argue that *State v. Kennedy*, 247 N.J. Super. 21, 588 A.2d 834 (App. Div. 1991), supports his claim that state law requires dismissal. Brief in Opp., p. 16. In *Kennedy*, the court held the remedy to be suppression, rather than dismissal. 247 N.J. Super. at 30, 588 A.2d at 838-39.

second question presented fairly includes and directly presents the subsidiary issue of remedy.

B. Whether Delayed Accrual Applies to Claims That Are Not Cognizable in Habeas Corpus Is Fairly Included in the First Question Presented and Is Properly Before the Court.

Respondent argues that petitioners have “waived” the argument that delayed accrual does not apply to claims that are not cognizable in habeas corpus because it “was not made in the lower courts.” Brief in Opp., p. 12. The dissenting judge in the court below advanced this argument to support his opinion that the Fourth Amendment claims were not subject to delayed accrual. Petition App., 16a-17a. No judge in the court below suggested that this argument was waived. This argument is fairly included in the first question presented in that the argument, if valid, would answer this question in the negative, whereas a positive answer to the first question presented must reject this argument.

The first question presented was vigorously litigated in the district and circuit courts, and no claim of “waiver” has been or could be made as to this question. “Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n. 2 (2000). This principle is particularly applicable when the circuit court “understood the tenor of the argument.” *Ibid.*

Respondent complains that “[f]or the first time in this litigation, petitioners argue that the concurring and dissenting opinions in *Spencer* [v. *Kemna*, 523 U.S. 1 (1998)] provide support for their interpretation of *Heck*.” Brief in Opp., p. 13. Although *Spencer* arguably supports petitioners’ interpretation of *Heck*, petitioners did not cite *Spencer* for that reason. Petitioners cited *Spencer* to support their argument that the first question presented merits review. Petition, p. 17. The

concurring and dissenting opinions in *Spencer*, which suggest that *Heck* does not apply to claims not cognizable in habeas corpus, have caused circuit courts to question whether *Heck* applies to these claims. *Ibid.* The first question presented provides this Court with the opportunity to settle the matter.

C. The Circuit Split Is Substantial and Warrants Review.

The Seventh Circuit's decision in *Ienco v. Angarone*, 429 F.3d 680 (2005), did not "firmly resolve" that Circuit's view of *Heck*'s footnote seven. Brief in Opp., p. 8. Rather, *Ienco* demonstrates the Seventh Circuit's confusion and vacillation. In an earlier appeal in the same case, the court stated that *Ienco*'s Fourth Amendment claims were time-barred because they "expired two years after his arrest." *Ienco v. City of Chicago*, 286 F.3d 994, 1000-01 (7th Cir. 2002). In *Ienco v. Angarone*, the court referred to its earlier ruling as erroneous "dicta." 429 F.3d at 684. The reference to "dicta" was itself dicta because the court refused to allow *Ienco* to resurrect his Fourth Amendment claims, having concluded that *Ienco* abandoned them. *Id.* at 684-85.⁴ The conflicting *Ienco* decisions highlight that circuit's confusion about *Heck*'s footnote seven.

The Eighth Circuit's decision in *Anderson v. Franklin County*, 192 F.3d 1125 (1999), did not follow what respondent refers to as the "majority rule." Brief in Opp., p. 8. The plaintiff's Fourth Amendment claims did not include unlawful search, *id.* at 1128, and the decision made no fact-based analysis of what, if anything, was uncovered by a search. The plaintiff's Fourth Amendment claims of false arrest and

⁴ In response to *Ienco*'s assertion that he did not voluntarily abandon these claims but instead relied upon extant Seventh Circuit precedent holding them to be time-barred, the court did not "reject [the] position . . . that there [was] a lack of clarity concerning the accrual." Brief in Opp., p. 8 n. 1. Rather, the court responded that *Ienco* could have anticipated this construction of *Heck*. 429 F.3d at 684.

imprisonment and excessive force were advanced with his contention that "he was coerced into pleading guilty." *Id.* at 1131. The court appears to have affirmed the district court's application of the *Heck* delayed-accrual rule to dismiss these claims because this contention would necessarily have implied the invalidity of the plaintiff's conviction. *Ibid.* In any event, there was no analysis of tainted evidence and no adoption of the "majority rule."

That the Tenth Circuit in *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553 (1999), noted that it was not "faced with the rare situation . . . where all evidence was obtained as a result of an illegal arrest" does not mean that it would in this situation abandon its construction of footnote seven. The court reaffirmed its view that "nothing in *Heck* changes the general rule that causes of action relating to an allegedly illegal arrest arise at the time of the arrest," 195 F.3d at 558, and its "disagree[ment] with . . . cases" that hold that delayed accrual "depends on whether evidence obtained as a product of the arrest is used at trial." *Id.* at 559 n. 4. The *Beck* court's agreement that accrual for a claim of illegal arrest is *sometimes* delayed hinged upon special circumstances such as those described in *Heck*'s footnote six, 195 F.3d at 558-59, e.g., those in which a plaintiff convicted of resisting a lawful arrest seeks to bring a § 1983 cause of action claiming that the arrest was unlawful. *Heck*, 512 U.S. at 487 n. 6.

The Eleventh Circuit's decision in *Hughes v. Lott*, 350 F.3d 1157 (2003), did not adopt what respondent refers to as "the majority approach." Brief in Opp., p. 9. Rather, the court held that "*Heck* does not *generally* bar [Fourth Amendment] claims." 350 F.3d at 1160 (emphasis added). Like the Tenth Circuit in *Beck*, the *Hughes* court clarified its use of the adverb "generally" by reference to *Heck*'s footnote six. 350 F.3d at 1160 n. 2. In reinstating the search and seizure claim and holding that it was "impossible" to determine from the existing record whether the delayed-accrual rule should apply, 350 F.3d at 1161, the court neither ordered nor suggested the fact-based inquiry that the majority opinion below endorses.

Nor did the First Circuit so suggest in *Nieves v. McSweeney*, 241 F.3d 46, 52 n. 4 (2001), when it referred to "rare and exotic circumstances in which a § 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." The *Nieves* court is at odds with the majority opinion below.

Even if, as respondent argues, "the trend in the Circuits is . . . in [the] direction" of the majority opinion below, Brief in Opp., p. 1, the matter warrants review because no Circuit opinion has taken into account this Court's expansive interpretation of *Heck*'s footnote seven in *Nelson v. Campbell*, 541 U.S. 637, 647 (2004). See Petition, p. 15. Respondent argues that *Nelson* is irrelevant because it did not deal with delayed accrual. Brief in Opp., p. 13 n. 4. But the issue before the *Nelson* court - the distinction between habeas claims and § 1983 claims - informed the *Heck* opinion, *see* 512 U.S. at 480-81, and this Court's construction of footnote seven of *Heck* in its *Nelson* decision in turn informed this Court's resolution of *Nelson*.

D. Policy Considerations Advanced by Respondent Do Not Diminish the Need for Review.

That "different approaches to civil rights claims in state and federal court are often the result of federalism principles and the fact that courts differ in access or procedures," Brief in Opp., p. 12, is not a reason to tolerate the conflict between federal and state courts in New Jersey about the proper construction of *Heck*'s footnote seven. The question of when a federal claim for relief accrues is a question of federal law. *Rawlings v. Ray*, 312 U.S. 96 (1941); *Cope v. Anderson*, 331 U.S. 461 (1947). The answer to that question should be the same in state and federal courts. Plaintiffs should not be given the incentive to forum-shop for the court, federal or state, that will allow their claims to proceed.

Respondent endorses toleration of the uncertainty about accrual effected by the majority opinion below because "*Heck* itself creates deferral rules for statutes of limitations that

inevitably will create some uncertainty." Brief in Opp., p. 12. The uncertainty is not "inevitable" and arises from the majority opinion's erroneous construction of *Heck*'s footnote seven.

Respondent asserts that "there will be no civil rights action until (and unless) the state court criminal proceedings are resolved in the plaintiff's favor." Brief in Opp., p. 13. The uncertainty about the date of accrual unwiseley encourages plaintiffs to file early, prophylactic complaints to avoid expiration of the statute of limitations. Regardless of how *Heck*'s footnote seven is construed, many of those complaints will present Fourth Amendment causes of action that have accrued although the state court criminal proceedings have not been resolved in plaintiff's favor.

Respondent asserts that under petitioners' approach "there would be far greater intrusion into state criminal proceedings than is permitted under the ruling" below. Brief in Opp., p. 1; *see also id.* at 13-14. The need to make a fact-based analysis of the criminal trial to determine the applicability of doctrines such as independent source, inevitable discovery, and especially harmless error - with an evaluation of the strength of the prosecutor's case - imposes a layer of intrusion above and beyond that imposed by the civil rights action itself.

Respondent states that "[p]etitioners appear to reject the approach taken by some federal courts in staying civil proceedings pending resolution of the criminal charges." Brief in Opp., p. 14. Petitioners endorse stays in appropriate cases but understand that stays must be premised upon abstention doctrines or bases other than *Heck*'s delayed-accrual rule. Doctrines other than delayed accrual appropriately address federal interference in pending criminal prosecutions. *E.g.*, *Heck*, 512 U.S. at 487 n. 8.

Respondent argues that "there is no indication that the fact-based approach has caused any of the problems that the petitioners' *[sic]* hypothesize." Brief in Opp., p. 14. Indication of problems in construing *Heck*'s footnote seven appears in

circuit courts' conflicting opinions and their efforts to grapple with its meaning. Indication of uncertainty in its application appears in the caselaw, including *Ienco v. Angarone*, 429 F.3d 680, 684 (7th Cir. 2005), upon which respondent relies. See discussion, *supra*, p. 5. Indication of problems is evident in caselaw requiring an automatic stay pending resolution of criminal charges in circuits that have adopted the approach of the majority opinion below. Petition, pp. 13-14.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted on both of the questions presented.

Respectfully submitted,
ZULIMA V. FARBER
Attorney General of New Jersey

Patrick DeAlmeida
Assistant Attorney General
Larry R. Etzweiler*
Senior Deputy Attorney General

***Counsel of Record**

R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
(609) 633-7786

Dated: February 27, 2006